NO. 48549-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT MCCOMB, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello

No. 13-1-01257-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the defendant was sentenced to a standard range sentence based on a correctly calculated offender score, is he statutorily prevented from appealing the standard range sentence?

2. Where the defendant waived his right to appeal his offender score and standard range, is he now prevented from challenging his stipulated offender score?

3. Where the trial court calculated the defendant's offender score as a nine plus based upon the defendant's extensive criminal history and current offenses, was the Court's calculation correct?

4. Where the legislature has determined that the Court of Appeals may require a defendant who does not prevail on appeal to pay for the cost of his appeal, should this Court make a determination that appellate costs are appropriate if the State prevails on appeal and seeks costs?

B. STATEMENT OF THE CASE.

1. Procedure

Scott William McComb, hereinafter "defendant," was charged with identity theft first degree, possession of stolen property second degree, theft second degree, and bail jumping. CP 8-10. All of the charges arose from the same series of incidents. *Id.*

The defendant pled guilty as charged on March 26, 2015. CP 31-41. At the same time as the plea agreement was entered, the defendant stipulated in writing to his prior record and offender score. CP 42-44. He also expressly waived his right to appeal. CP 44. Following the defendant's plea, he was released on his own recognizance with an electronic home monitoring (EHM) condition attached[1]. CP 85-86.

On October 26, 2015, the defendant was scheduled for sentencing. 12/3/15RP 2[2]. However, because the defendant wanted to withdraw his guilty plea, it was set over for November 6, 2015. 12/3/15RP 3. That sentencing hearing was then set over until November 10, 2015, so that the defendant could file a motion to withdraw his plea. *Id.* On November 10, the sentencing was set over again. *Id.* At that hearing the trial court signed an order for the defendant to undergo a drug offender sentencing alternative screening. CP 57-62. Sentencing occurred on December 3, 2015. CP 63-76. At sentencing the court followed the prosecutor's recommendation of the low end of the sentence for the identity theft of 63 months, with the high end on the other three counts and all sentences to run concurrently. 12/3/15RP 19.

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[1] It is unclear from the record why the parties agreed to EHM pending sentencing. The defendant may have received EHM for any number of reasons, including, other pending cases, getting a DOSA evaluation, being a confidential informant, and/or needing time to finalize personal matters prior to his incarceration.

[2] The Verbatim Report of Proceedings are contained in three volumes. Each volume will be referred to be the date of the proceeding.

2. Facts

On March 26, 2015, the defendant entered into a plea agreement with the State. CP 31-41. As part of the plea agreement, the State agreed to make a recommendation to the judge of 63 months on count I, identity theft. *Id* at 6(g). The 63 months was based on being the low end of the standard sentencing range for the defendant's offender score of nine plus. *Id.* at 6(a).

The determination of the defendant's offender score was based on both current and past offenses. The defendant stipulated to his offender score in a written stipulation filed the same day as his guilty plea. CP 42-44. As part of the stipulation, a 1993 out-of-state conviction was scratched out and went unscored. *Id.* After scratching out the 1993 conviction, there were seven past scored convictions remaining in the stipulation in addition to the four current offenses. *Id.* The stipulation included an express, written waiver of appeal. *Id.*

C. ARGUMENT.

1. A SENTENCE WITHIN THE STANDARD RANGE BASED ON A CORRECTLY CALCULATED OFFENDER SCORE MAY NOT BE APPEALED, AND THUS THE DEFENDANT CANNOT CHALLENGE HIS STANDARD RANGE SENTENCE.

A sentence that is within the standard sentence range for an offense shall not be appealed. RCW 9.94A.585(1), ***State v. Ammons***, 105 Wn.2d 175, 181, 713 P.2d 719, 718 P.2d 796 (1986). A defendant may, however,

challenge a sentence that is outside of the standard sentence range, and may also challenge a trial court's procedures in imposing a standard range sentence. RCW 9.94A.585(2), ***State v. Knight***, 176 Wn. App. 936, 957, 309 P.3d 776 (2013). A defendant may also challenge an incorrectly calculated offender score. ***State v. Wilson***, 170 Wn.2d 682, 688, 244 P.3d 950 (2010).

In this case, none of the exceptions to challenging a sentence apply. The identity theft charge is a Level IV offense that, with an offender score of nine plus, carries a standard range of 63-84 months. RCW 9.94A.510, .515. The defendant received the low end of that range. CP 31-41(6)(a). At no point has the defendant challenged the procedures used by the court in imposing the sentence. Because the defendant received the low end of the standard range, he cannot challenge his sentence on appeal.

2. BY EXPRESS APPEAL WAIVERS INCLUDED AS TERMS OF HIS PLEA AGREEMENT, THE DEFENDANT WAIVED ANY CHALLENGE TO HIS OFFENDER SCORE AND STANDARD RANGE.

A guilty plea generally waives challenges to a defendant's offender score. ***State v. Harris***, 148 Wn. App. 22, 29, 197 P.3d 1206 (2008). This is because a defendant's agreed standard range sentence is based partially on their criminal history and because guilty plea agreements usually contain a stipulation to criminal history. *Id.* A defendant who knowingly, voluntarily, and affirmatively stipulated to an offender score to gain the

benefit of the plea agreement has waived his right to appeal his offender score calculation and/or invited any error in the offender score calculation. ***State v. Hickman***, 112 Wn. App. 2d 187, 191, 48 P.3d 383 (2002).

Here, the defendant stipulated to his offender score, both in a stipulation to prior record and in his guilty plea. CP 42-44, 31-41 at 6(a). As part of the plea agreement, the State would recommend to the judge that the defendant's sentence would be for the low end range. CP 31-41 at 6(g). The defendant signed both the stipulation to prior record and the plea agreement. The plea statement specifically states "...if a standard range sentence is imposed upon an agreed offender score, the sentence cannot be appealed by anyone." CP 31-41 at 6(h). The stipulation states, "If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation." CP 44.

During discussion of the plea agreement on the record, the defense attorney stated it was his standard practice to put a check next to items on the plea form that he went over with the defendant. 3/26/15RP 6. The provision concerning the right to appeal had a check mark next to it. CP 31-41 at 6(h). Hence, the record shows that defendant went over, and presumably understood, that he waived his right to appeal. Thus, the defendant waived his right to appeal a standard range sentence.

3. EVEN IF THE DEFENDANT DID NOT WAIVE HIS RIGHT TO APPEAL, THE SENTENCING COURT PROPERLY CALCULATED THE DEFENDANT'S OFFENDER SCORE AS A NINE PLUS.

For the sake of argument, if the defendant were deemed not to have waived his right to appeal, he nonetheless cannot establish error in his sentencing calculation. In Washington, with a few exceptions, felony sentencing depends on a defendant's offender score and the resulting standard sentencing range. RCW 9.94A.510, .525 and RCW 9.94A.530(1). A defendant's offender score is calculated from "the sum of points accrued" from a conviction (or convictions) "which exists before the date of sentencing." RCW 9.94A.525(1). This Court reviews a sentencing court's calculation of an offender score *de novo*. ***State v. Bergstrom***, 162 Wn.2d 87, 92, 169 P.3d 816 (2007) (citing ***State v. Tili***, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003)).

The State has the burden of proving the defendant's criminal history by a preponderance of the evidence. RCW 9.94A.500(1). ***State v. Hunley***, 175 Wn.2d 901, 909–10, 287 P.3d 584 (2012), citing ***State v. Ford***, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999). The best evidence of a prior conviction is a certified copy of the judgment. *Id.* at 910. But the State can meet its burden of proof if the defendant acknowledges the

criminal history on the record. ***State v. Mendoza,*** 165 Wn.2d 913, 930, 205 P.3d 113 (2009), *disapproved of on other grounds by* ***State v. Jones,*** 182 Wn.2d 1, 338 P.3d 278 (2014). "Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing." RCW 9.94A.530(2). The "mere failure to object to a prosecutor's assertions of criminal history does not constitute such an acknowledgement." ***State v. Mendoza,*** 165 Wn.2d at 928.

The Sentencing Reform Act permits the sentencing court to rely on unchallenged facts and information. ***State v. Nitsch***, 100 Wn. App. 512, 520, 997 P.2d 1000 (2000). In ***Nitsch***, Division I found that because the defendant had explicitly agreed to the sentencing range, the agreement was an implicit acknowledgement of his offender score. Thus, the sentencing court was allowed to consider this acknowledgement in the offender score calculation.

In this case, there is more than acknowledgment. Here the defendant expressly stipulated in writing and thereby explicitly agreed to both his offender score and his sentencing range. The sentencing court was permitted to consider his stipulation when it determined his offender score and sentencing range.

The trial court properly calculated the defendant's offender score. In the present case, the defendant has three other current offenses in addition to the identity theft for which he was sentenced. CP 8-10. Because each of the current offenses was non-violent, they were scored at one point each. RCW 9.94A.525. CP 42-44. The defendant also had seven prior scored offenses that were also non-violent. *Id.* Each of those were also scored as one point each. *Id.* The total of the current offenses and the past offenses yields an offender score of a nine plus. This is exactly the score calculated by the sentencing court.

The State, defense, and the sentencing court all properly calculated the defendant's offender score. When the defendant formally entered the plea on the record, there was no discussion of the stipulation to his offender score, other than the prosecutor stating he was handing such to the bench and the judge stating he was accepting the stipulation. 3/26/15RP 3, 11. At no time did the defendant say that he disagreed with or misunderstood the stipulation. Thus, the defendant agreed in writing to his offender score being properly calculated.

The State agrees with the defendant that the judgment and sentence incorrectly lists the defendant's 1993 out-of-state conviction. Brf. of App. at 4. However, the defendant's offender score was not based on the judgment and sentence. Rather, the offender score was based on a

stipulation to prior offenses which specifically struck out the 1993 out-of-state conviction. Even when the 1993 offense is struck, the defendant still has an offender score of at least nine based upon his three other current convictions and his other numerous convictions over the years. Defense concedes that the current offenses alone result in an offender score of six. Brf. of App. at 2. When taken with the other prior convictions included in the offender score, the offender score on count I, to which the defendant was sentenced, is at least nine.

4. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE DEFENDANT'S SENTENCE AND SHOULD BE ADDRESSED IF THE STATE PREVAILS AND SUBMITS A COST BILL.

RCW 10.73.160(2) states that "the court of appeals...may require an adult offender convicted of an offense to pay appellate costs." It has been upheld many times that an appellate court may provide for the recoupment of costs from a defendant who does not prevail on appeal. *See* ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). As the Court of Appeals for Division I stated in ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See, also* RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000). The issue is not

whether the Court can order appellate costs, but whether it should and when.

The idea that those convicted of a crime should be required to pay some of the costs is not new. In 1976[3], the legislature enacted RCW 10.01.160, which permitted trial courts to order the payment of various costs, including those of prosecuting the defendant and his incarceration. *Id.* In ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute towards paying for appointed counsel under this statute did not "impermissibly burden defendant's constitutional right to counsel." *Id.* at 818.

Imposition of appellate costs is also not new. The statute was enacted in 1995 in response to ***State v. Rogers***, 127 Wn.2d 270, 281, 898 P.2d 294 (1995), which held that appellate costs could not be awarded in the absence of statutory authority. *See* Laws of 1995, Ch. 275 § 3; ***State v. Nolan***, 141 Wn.2d at 623. ***Nolan*** examined RCW 10.73.160 in detail and noted that it was specifically enacted by the legislature in order to allow the courts to require one whose conviction and sentence is affirmed on appeal to pay appellate costs including statutory attorney fees. ***State v. Nolan*** at 627. In ***Blank***, *supra*, at 239, the Supreme Court held the statute

[3] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96

constitutional and affirmed this Court's award of appellate costs as "reasonable". *See* ***State v. Blank***, 80 Wn. App. 638, 643, 910 P.2d 545 (1996).

In both ***Nolan*** and ***Blank***, the defendant initiated review of the appellate costs issue by filing an objection to the State's cost bill. ***State v. Blank***, 131 Wn.2d at 234, ***State v. Nolan***, 141 Wn.2d at 622. As to a defendant's ability to pay, the court in ***Blank*** stated: "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." ***State v. Blank***, 131 Wn.2d 230, 242, 930 P.2d 1213(1997)(footnote omitted).

In light of the Supreme Court's "common sense" determination in ***Blank*** it can be argued that conditioning "appellate review" of an appellate costs issue on whether "the issue is raised in an appellant's brief" prematurely raises an issue not then properly before the court. ***State v. Sinclair***, 192 Wn. App. 380, 367 P.2d 612, *review denied*, 185 Wn.2d 1034, 377 P.3d 733 (2016). The court in ***Sinclair*** concluded (somewhat in contradiction of ***Blank***) that, "Ability to pay is certainly an important

factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor." *Id.* at 389.

Under RCW 10.73.160(4), the proper time for considering a defendant's ability to pay appellate costs is when the State seeks to collect. *See* ***State v. Blank***, 131 Wn.2d at 242; ***State v. Smits***, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991). At that time there is no need to speculate as to the defendant's financial status; an accurate and timely determination can made of whether the costs "will impose a manifest hardship on the defendant or the defendant's immediate family". RCW 10.73.160(4).

Prior to the time of collection, the determination of whether the defendant either has or will have the ability to pay is necessarily somewhat speculative. ***State v. Baldwin***, 63 Wn. App. at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for determining if a defendant is indigent "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d at 241–242. *See also* ***State v. Wright***, 97 Wn. App. 382, 965 P.2d 411 (1999). Further, as noted in ***Blank*** "there is no reason

[at the time of the decision] to deny the State's cost request based upon speculation about future circumstances." *Id.* at 253.

It is important to acknowledge that in the ***Blazina*** case, the Supreme Court rejected the argument that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." ***State v. Blazina***, 182 Wn.2d 827, 832, 344 P.3d 680(2015) (Footnote one). However the statute at issue in ***Blazina*** specifically prohibited trial courts from ordering a "defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). That prohibition is not included in the appellate costs provision. *See* RCW 10.73.160.

Most criminal defendants are represented on appeal at public expense. RCW 10.73.160(3) specifically allows for "recoupment of fees for court-appointed counsel." Since defendants with "court-appointed counsel" are necessarily indigent, the allowance for attorney fees for such counsel would be meaningless if such fees were invariably denied on the basis of ability to pay. By enacting RCW 10.01.160 and RCW 10.73.160, the legislature expressed its intent that criminal defendants, including indigent ones, should contribute to the cost of their cases. RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 was enacted in 1995. These legislative determinations should be given full effect and any award of costs should reflect the cost to the public of this appeal. As to ability to

pay, this Court may award appellate costs, including attorney fees, on the basis of the actual cost of this appeal or even with a discount, secure in the knowledge that ability to pay must be taken into account "before enforced collection or any sanction is imposed for nonpayment. . . ." ***State v. Blank***, 131 Wn.2d at 242.

D. CONCLUSION.

For the foregoing reasons, the State urges the Court to affirm the trial court's calculation of the defendant's offender score, standard range, and low end sentence, and to defer any decision on an award of appellate costs until the State submits or elects not to submit a cost bill in the event it is the prevailing party.

DATED: December 2, 2016.

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